



U.S. Citizenship
and Immigration
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FILE:

SRC 07 052 53073

Office: TEXAS SERVICE CENTER

Date: JAN 10 2008

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a company that develops and licenses medical practice management software and system integration with developed software. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the 2003 priority date of the visa petition, and that the petitioner's owners' assets could not be used to establish the petitioner's ability to pay the proffered wage. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 17, 2007 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on November 20, 2003. The proffered wage as stated on the Form ETA 750 is \$52,000 per year. The Form ETA 750 states that the position requires a four-year baccalaureate

degree or foreign academic equivalent in electrical engineering or electrical and electronics engineering, and one year of work experience in the proffered position, or one year of work experience as a software engineer.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹.

On appeal, counsel submits a brief. Counsel also submits copies of the following Board of Alien Labor Certification Appeals (BALCA) precedent decisions: *Matter of Ohsawa America*, 1988-INA-240 (BALCA 1988), and *Matter of Ranchito Coletero*, 2002-INA-104 (2004 BALCA). Counsel also submits an excerpt from a publication entitled "§3.105, Forming and Operating California LLCs" that discusses the liability of owners of business obligations with regard to businesses such as general partnerships, limited partnerships, corporations, and limited liability companies; an excerpt from the 'Lectric Law Library titled Limited Liability Companies A Summary, (available on December 17, 2007 at <http://www.lectlaw.com/files/buol.htm>), and an excerpt from 20 C.F.R. § 656.20 entitled "Subpart C-Labor Certification Process." Counsel also submits the beneficiary's W-2 Forms for tax years 2003 to 2006, that indicated the petitioner paid the beneficiary \$25,000 in 2003, \$27,000 in 2004, \$49,030 in 2005, and \$56,342 in 2006. The petitioner also submits pay record documents for the beneficiary for January 31, 2007 to September 30, 2007 that indicates the beneficiary earned a monthly salary of \$4,334 from January to August 2007, and then received a monthly salary of \$4,532 in September 2007.

Counsel also resubmits the petitioner's Forms 1065 for tax year 2003 to 2006 to the record as well as two letters from the petitioner's two partners dated August 31, 2007. In these letters the joint owners individually stated that since the 2002 inception of the petitioner, each owner has been willing and personally able to guarantee payments of the petitioner's various expenses including employee compensation. [REDACTED] in her letter also states that she is willing and able to guarantee payments including compensation for employees based on the salaries and income from her medical practice and on the owners' net worth consisting of farmland and real estate properties owned jointly with her husband.

In response to the director's request for further evidence dated June 20, 2007, the petitioner also submitted a letter from [REDACTED], Visalia, California, dated August 23, 2007. In his letter, [REDACTED] stated that a copy of the petitioner's owner's statement of financial condition as of July 31 2007 shows a net worth slightly in excess of \$5,300,000. [REDACTED] also notes that although he had not prepared statements of the petitioner's owners' financial condition for previous years, since the petitioner's owners owned their real estate assets for many years, [REDACTED] felt comfortable estimating that the petitioner's owners' net worth had been in the range of \$3,000,000 to \$5,000,000 from tax years 2002 to 2006. [REDACTED] submitted a two-page document with accompanying notes entitled [REDACTED] Statement of Financial Condition, July 31, 2007." The second page of this document, entitled [REDACTED] 2006 Crop Year Proceeds, Post Harvest and Cultural Expense," indicates that as of July 2007, the petitioner's owners' net worth is \$5,373,026 with primary financial assets in farm properties and crops. Counsel also submitted

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

copies of [REDACTED]'s Schedules C, Profit or Loss From Business, for her medical practice for the years 2003 through 2006. This page indicates net 2006 crops sales of kiwis and citrus fruit of \$3,130,560, as well as crop income before interest and legal expenses of \$651,949. Counsel also submitted a Form LSFSL, CA Individual Financial Statement, for the petitioner's two owners as of July 31, 2006 that indicates a joint net worth of \$4,504,171. Finally, counsel submitted a partial copy of an interoffice memorandum written by Michael Aytes, Acting Associate Director, Domestic Operations, Citizenship and Immigration Services (CIS).² The record also contains copies of R.B. Sidharaju's W-2 Forms for tax years 2003 to 2006, and a brochure that describes the petitioner's business operation. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a limited liability company. On the petition, the petitioner claimed to have been established on March 18, 2002, to have a gross annual income of \$146,196, and a net annual income of \$15,411, and to currently employ three workers. On the Form ETA 750B, signed by the beneficiary on November 17, 2003, the beneficiary claimed to have worked for the petitioner since April 2002.

On appeal, the petitioner asserts that CIS had not considered the petitioner's owners' personal assets and annual income in determining that the petitioner has not established its ability to pay the proffered wage of \$52,00 in tax years 2003 and 2004. Counsel cites *Ohsawa America*, 1988-INA-240 (BALCA 1988) for the proposition that the personal assets of a corporate owner should be considered in determining the corporations' ability to pay a wage. Counsel notes the BALCA's reference to a report by an accounting firm that stated the major shareholder who had indicated a willingness to continue to fund the company as personally worth in excess of \$4,000,000. Counsel also notes that the BALCA decision stated that on the basis of the apparent financial worth and continuing financial support of the major shareholder, it found that the employer had shown that there are funds sufficient to pay the beneficiary.

Counsel also cites *Ranchito Coletero*, 2002-INA-105 (BALCA 2004) that in turn cites *Ohsawa America* for further support that the financial assets of the majority shareholder should be considered in determining the petitioner's ability to pay the proffered wage. Counsel notes that both of the petitioner's owners have indicated their willingness and ability to guarantee payments for the petitioner, including compensation for employees. Counsel also notes that Dr. Sidharaju's annual incomes from her medical practice range from \$184,898.62 to \$212,238.28 for the past four years and that the owners' joint net worth has been in the range of \$3 million to \$5 million for the years 2002 to 2006. Counsel states that based on the two above-mentioned BALCA decisions, the petitioner's owners' personal assets and incomes were sufficient and should be considered in determining the petitioner's ability to pay the proffered wage.

Counsel also notes that the director's statement in his denial decision that the petitioner's owners are not able to use personal assets in establish the petitioner's ability to pay because the limited liability company's owner's liability is limited to the amount of his or her investment is incorrect. Counsel states that generally owners of a limited liability company are not liable for the obligations of the limited liability company; however, if an owner affirmatively undertakes responsibility for such obligations, the member or owner will be liable for the debts of the limited liability company. Counsel refers to the excerpt from *Forming and Operating California LLCs*, in support of her assertion.

² Memorandum from Michael Aytes, Acting Associate Director, Domestic Operations, *AFM Update: Chapter 22: Employment-based Petitions (AD03-01)*, HQPRD 70/23.12, September 12, 2006.

Counsel also cites *Matter of Sonogawa*, 12 I &N Dec. 612 (Reg. Com. 1967) for the proposition that a petitioner's expectations of continued increase in business and increasing profits are reasonable expectations and that based on these expectations, a petitioner could establish its ability to pay the stipulated wages.

Counsel then refers to the following excerpt from the Aytes memo:

Sometimes companies will operate at a loss for a period of time to improve their business position in the long run. A prime example of that would be research and development costs on a product line that is not expected to generate revenue for several years. In those instances the documentation should fully explain the sources of funding for the entity (or unit) and the expected profit potential. Whether the company can demonstrate it has the ability to pay the alien the wages described in the petition will depend on the specific facts presented.

(Emphasis added by counsel.)

Counsel then lists the source of funds for the actual petitioner as the petitioner's owners' joint personal assets/net worth and one of the owner's income from her medical practice. Counsel lists the petitioner's gross annual income for the years 2003 to 2006 as follows: \$60,583 in 2003, \$83,413 in 2004, \$146,196 in tax year 2005, and \$192,298 in tax year 2006. Counsel states that the increase in gross profits in tax year 2004 from tax year 2003 was 37 percent, while the petitioner showed an increase of 75.26 percent in gross annual income in tax year 2005 from tax year 2004, and an increase of 31.53 percent in tax year 2006 from tax year 2005. Counsel states that this is an excellent profit potential for medical practice management software solutions offered by the petitioner due to the ever increasing needs by healthcare organizations to control the rising healthcare cost and to optimize regulatory compliance. Counsel also notes that the petitioner had employed the beneficiary since 2002 and that the beneficiary's salary has increased each year.

In examining the petitioner's ability to pay the proffered wage in tax year 2003, counsel states that the petitioner only had to show its ability to pay the proffered wage of \$52,000 from the November priority date to the end of tax year 2003, and that the prorated salary required to be paid in 2003 is less than \$8,666.67, which counsel describes as one sixth of \$52,000. Counsel states that since the beneficiary's wage for 2003 was \$25,000, the petitioner has shown its ability to pay the proffered wage during the priority date year.

With regard to the petitioner's ability to pay the proffered wage in tax year 2004, counsel notes that the beneficiary's wages for tax year 2004 were \$27,000. Counsel states that although the difference between the beneficiary's wages and the proffered wage exceeds the petitioner's 2004 net income and net current assets, in 2004, the petitioner's owners had a personal net worth of over \$3 million in tax years, and that one owner had income of \$184,989.62. Counsel notes that the director, in his decision, stated that the petitioner had established its ability to pay the proffered wage in tax years 2005 and 2006, and makes no further comment with regard to these years.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning

business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel states that a Department of Labor's (DOL) BALCA case is applicable to the instant petition before the Department of Homeland Security's AAO. Citing to *Ohsawa America*, 1988-INA-240 (BALCA 1988), counsel states that this case stands for the proposition that the personal assets of the petitioner's two owners were sufficient and should have been considered in determining the ability to pay the proffered wage in that case. Counsel does not state how DOL precedent is binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Moreover, counsel also does not state that the BALCA panel in *Ohsawa America* also considered the fact that the petitioning entity showed increased revenue and decreased operating losses in addition to one of its shareholder's willingness to fund the company. In the instant petition, the petitioner shows increases in gross receipts, but with accompanying increases in deductions, and salaries, with resultant ordinary loss from trade or business activities in tax year 2006 and higher salaries paid out than revenue received so an increase in operating losses as well. Thus, in addition to not being binding precedent, *Ohsawa America* is distinguishable from the facts of the instant petition.

Counsel fails to note that the report by an accounting firm and the corroboratory letter from the Bank of America with regard to the petitioner's shareholder's assets were also noted in *Ohsawa America* in the BALCA determination with regard to the petitioner's ability to pay the proffered wage. In the instant petition, while the petitioner's two owners have considerable real estate property and have a citrus/kiwi business, their actual personal worth in terms of readily available assets, such as cash, money market funds, stocks, is not identified in the record. Furthermore, no evidence of any such readily available assets, such as a check cashing account, or stock portfolio statement for the years in question, is found in the record.

Counsel also cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that entities in an agricultural business regularly fail to show profits and typically rely upon individual or family assets. Again, counsel does not state how the Department of Labor's (DOL) BALCA precedent is binding on the AAO. See 8 C.F.R. § 103.9(a). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a limited liability company.

In sum, contrary to counsel's assertions and references to BALCA decisions, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Thus, the petitioner's owners' real estate properties and wages from a medical practice would not be considered as sources of funding when the petitioner is a corporation, an S corporation or a partnership. In the alternative, if the petitioner was a sole proprietorship, the petitioner's owners' personal assets would be considered in the determination of the petitioner's ability to pay the proffered wage. However, the instant petitioner is not a sole proprietorship. Therefore the assets of the petitioner's owners' will not be considered in these proceedings.

Counsel's reference to the Lectric company's website information on limited liability companies also appears to undermine her assertion with regard to utilizing the petitioner's owner's assets to pay the proffered wage. The excerpt with regard to limited liability companies states that all members are shielded from the company's debts unless they affirmatively undertake responsibility for such debt, such as by a guarantee to a lender. Although the petitioner's partners submitted letters indicating their willingness and ability to pay the petitioner's expenses, including salaries, these statements do not appear to be legally enforceable as a guarantee. The letters lack the amount of the salary to be guaranteed, the period of the purported guarantee, the conditions under which the guarantee would take effect, and the consideration received by the letter writers in return for the guarantee. A legally enforceable guarantee would require an explicit commitment of a guarantee, not merely an expression of a desire to make a guarantee. *See generally* 38 Am. Jur. 2d, guarantee, §§ 1,5, available on Westlaw database (updated May, 2003).

Counsel on appeal also states that the petitioner only has to establish its ability to pay the beneficiary prorated wage, as of the November 20, 2003 priority date to December 31, 2003. However, the AAO will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.³

Counsel's reference to the Aytes memo is also not persuasive. First, the AAO is not bound by the guidance provided to adjudicators based on CIS interoffice memoranda. Second, counsel does not establish that the petitioner is the type of business described in the memo, namely, a research and development company, nor does the record establish a span of time in which the petitioner has operated at a loss.

With regard to establishing the petitioner's profit potential, as referenced in the Yates memo excerpt, counsel merely notes the petitioner's increase in overall gross annual income and states there is an excellent profit potential for medical practice management software solutions offered by the petitioner due to the ever increasing needs by healthcare organizations to control the rising healthcare cost and to optimize regulatory compliance. However, counsel provides no further evidentiary documentation to further support this assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has submitted a W-2 forms that establish the petitioner paid the beneficiary \$25,000 in 2003, \$27,000 in 2004, \$49,020 in 2005, and \$56,342 in tax year 2006. The petitioner, thus, has established that it paid the beneficiary a salary higher than the proffered wage in tax year 2006, and has established its ability to pay the proffered wage during 2006. However, the petitioner has to establish its ability to pay the difference between the beneficiary's wages and the proffered wage of \$52,000 in tax years 2003, 2004, and 2005.

³ The AAO notes that the petitioner did submit the beneficiary's payroll records for parts of tax years 2006 and 2007; however, beyond the W-2 Form submitted for the beneficiary's 2003 wages, there is no specific documentation of what wages the beneficiary received during the period of November 20, 2003 to December 31, 2003. Thus, the petitioner cannot establish that it paid the proffered wage during this period of time.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* at 537.

Since the petitioner established its ability to pay the proffered wage in tax year 2006, the AAO will not examine the petitioner's net income in tax year 2006 any further in these proceedings. The tax returns for the 2003 priority year and for tax years 2004 and 2005 demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2003, the Form 1065 stated net income⁵ of -\$8,896.

⁵ For a partnership, where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure shown on line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner's Schedule K for 2003 and 2005 has relevant entries for additional income and deductions and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K.

- In 2004, the Form 1065 stated net income of \$1,584.
- In 2005, the Form 1065 stated net income of \$15,261.

Therefore, for tax year 2005, the petitioner had sufficient net income to pay the difference between the beneficiary's wages of \$49,020, and the proffered wage of \$52,000, namely \$2,980. However, in tax years 2003 and 2004, as correctly determined by the director, the petitioner did not have sufficient net income to pay the difference between the beneficiary's wages and the entire proffered wage, namely, \$27,000 in tax year 2003 and \$25,000 in tax year 2004.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A partnership's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 15 through 17. If the total of a partnership's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. In the instant petition, the petitioner's net current assets during 2003 were -\$2,023, while the petitioner's net current assets during 2004 were \$0.

Therefore, for tax years 2003 and 2004, the petitioner did not have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for tax years 2005 and 2006. Counsel asserts in her brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel states that the petitioner's owners' assets can be used to pay the difference between the beneficiary's wages and the proffered wage. However, as previously stated, the AAO does not consider the assets of the shareholders of corporations or members of limited liability companies. Counsel also notes that, as in *Matter of Sonogawa*, the totality of the instant petitioner's circumstances should be examined in determining the petitioner's ability to pay the proffered wage.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and

⁶According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2003 and 2004 were uncharacteristically unprofitable years for the petitioner. In the instant petition, the petitioner's federal tax returns indicate the petitioner's business started on July 1, 2002, only seventeen months before it filed a Form ETA 750 for the beneficiary.⁷ Thus, the petitioner cannot point to the petitioner's longevity of business operations, or the petitioner's profile in the medical practice documentation industry as indicators of the petitioner's overall circumstances. The record also reflects that as the petitioner's salary levels and gross receipts, identified in its tax returns, increased, the operating expenses also grew. The AAO notes that the beneficiary worked for the petitioner throughout the time period from the 2003 priority date to the present, and, based on the petitioner's pattern of growth from the 2003 priority year date, this factor would not necessarily expand the petitioner's reasonable expectations of further growth and increased sales in the future. Although the petitioner's tax returns indicate increased sales from 2003 to 2006, this factor alone is not sufficient to establish the petitioner's overall circumstances are sufficient to pay the difference between the beneficiary's actual wages and the proffered wage during the priority year 2003 and through tax year 2004.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

⁷ As previously stated, the petitioner's ETA Form 750 was accepted by the Department of Labor on November 20, 2003.